Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD C. REMUS, TRUSTEE FOR
SUPERIOR METAL SHREDDERS, INC.,
Petitioner,

v.

CITY OF KALAMAZOO,
Respondent.

On Petition For A Writ of Certiorari
From The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTORARI

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QUESTIONS PRESENTED

1. Under the "Full Faith and Credit" provision of 28 U.S.C. §1738 (a federal court is to give a prior state court adjudication the same effect it would have in the state court) was Petitioner's 1995 Federal District Court "Federal Taking Claim" under the Fifth Amendment barred by state res judicata principles?

2. Does government regulation that compels a corporation to file for reorganization under Chapter 11 bankruptcy amount to a federal "taking"?

3. Does government revocation of a license to operate a business amount to a "taking"?

4. Has one more citizen of this country now been denied his federal rights in unpublished opinions which are the law for this one citizen, but contrary to the general law of the land?

5. Is the State of Michigan unwilling to protect Petitioner's federal rights?

PARTIES TO THE PROCEEDING

Only the Petitioner and the Respondent are parties to the proceedings.

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1. The current decisions conflict with this Court's decisions involving an important federal question that should be settled by this Court and depart from accepted and usual judicial proceedings in that under "Full Faith and Credit" provision, Title 28, U.S.C. §1738 Petitioner's claim of a "federal taking" is not precluded under the State of Michigan rule of "res judicata" for there is nothing to give " faith or

credit" to the State of Michigan trial and/or appellate courts; government regulation that compels a corporation to file for reorganization under Chapter 11 Bankruptcy does not amount to a federal "taking"; government revocation of a license to operate a business does not amount to a "taking"; one more citizen of this country has not been denied his federal rights in unpublished opinions which are the law for this one citizen, but contrary to the general law of the land; the State of Michigan is unwilling to protect Petitioner's federal rights 9

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, 96-2200, dismissing petitioner's appeal is reproduced in petitioner's appendix at A1. (there is no official citation to this unpublished opinion)

JURISDICTION

The judgment/order/opinion of the Court of Appeals was entered September 30, 1997. This court has jurisdiction under 28 U.S.C. §1254(1); Rule 10 a,c of the U.S. Supreme Court.

FEDERAL APPLICABLE LAW

The following constitutional and Statute provisions are applicable and reproduced in the Appendix:

U.S. Constitution, Amendment 5, A43
U.S. Constitution, Amendment 14, A44
U.S. Constitution, Article 5, §1, A45
Title 28, § 1738, A46
Title 42, § 1983, A47

STATEMENT OF THE CASE

In 1978 Superior Metal Shredders, Inc. placed in service one Hammond bulldog shredder costing $1.4 million with monthly payments and expenses of $60,000.00 to maintain and operate.

In October of 1979, Respondent moved to revoke Superior's 50% industrial facilities exemption certificate, although Superior was not violating any ordinances.

On December 3, 1979 the Respondent amended Section 24.20 of the Kalamazoo City Code to add a requirement that recycling dealers operate so as not to create a nuisance by reason, noise and/or vibration. . .

In April and May of 1980, the Respondent held a fact finding hearing on Superior's license renewal before the City Commission hearing officer. On June 17 Superior's recycling license was renewed with restrictions for noise and vibration.

On June 23, the Respondent's hearing officer having found the shredder was not a nuisance, the City Commission, again voted to revoke Petitioner's industrial facilities exemption. Due to the shredder being out of service for much of 1980, Superior filed (in October of 1980) in the U.S. Bankruptcy Court for protection from creditors under Chapter 11 of the Bankruptcy Act.

On December 5, 1980 an explosion occurred at the shredder with no damage to any property or persons.

On December 8, 1980 the Respondent notified Superior that the license for the shredder had been revoked due to excessive noise and the explosion of December 5.

Superior continued to operate the shredder without a license and on December 17, 1980 the Respondent filed suit against

Superior alleging a public nuisance, operating without a license, due to the explosion of December 5, 1980. A hearing was held on December 19, 1980 for a preliminary injunction before the Circuit Judge of the County of Kalamazoo, State of Michigan, upon Respondent's complaint. The court ordered a temporary injunction.

In January of 1981, vibration tests were run by the Respondent on the shredder, the shredder passed and commenced operation.

On June 12, 1981, tests conducted by the Respondent were conducted and the shredder passed.

From January 1981 to February 1983, Superior was periodically shut down by the Respondent pursuant to Respondent's motions and orders issued by the Circuit Court.

The shredder was put back in operation in May of 1983.

In July of 1983 an explosion took place at the shredder. Upon Respondent's request, the court shut down the shredder on July 23, 1983.

In August of 1983, there was a gas tank explosion and vibrations. The shredder was ordered shut down.

In January of 1984 on Respondent's request, the Circuit Court shut down the shredder for further vibration testing.

The shredder is designed to absorb explosions caused by shredding pre-crushed cars with gas or fumes still in the gas tank.

In September of 1984, upon the fourth petition of creditor's, the Chapter 11 reorganization was converted into a Chapter 7 liquidation of Superior. Petitioner Richard C. Remus was appointed Trustee.

From the time of its filing suit in circuit court against Superior, until the conversion in bankruptcy to Chapter 7 liquidation, the Respondent was designedly dilatory in its action in taking Superior to court, its doing of vibration tests so the machine could operate, and purposely seeking every opportunity to put Superior out of business.

In October of 1984, the circuit court issued a permanent injunction enjoining Superior from operating the shredder and dismissed the suit further ordering that a successor owner may petition the court for modifications.

The assets of Superior were subsequently sold.

In February of 1986, a successor owner of the shredder, Kalamazoo Metal Recycler's, Inc., (Farrell) hereinafter referred to as "successor", petitioned the court to commence business with the shredder; as of March 1, 1986 expending $126,000.00 to fix the shredder. The Circuit Court allowed the successor to start operations.

In June of 1986, after operating the shredder for three months and having three explosions, the successor petitioned the Circuit Court to: 1) change the court

ordered operating hours of 8:30 a.m. to 5:00 p.m. weekdays and no weekend operations and automatic shut down until checked by the Respondent of problems with vibrations or explosions, to 8:00 a.m. to 6:00 p.m. weekdays, 10:00 a.m. to 6:00 p.m. on Saturdays, and if a breakdown occurred including weekly explosions, the successor could open and operate one hour early on the next week day for the reason successor needed more hours of operation if successor was to meet his financial commitments; 2) additionally, the requirements of mandatory testing for vibrations was eliminated; 3) the successor/owner also argued that explosions were a necessary and unpreventable cost of operating the shredder, and the transmission and drive shafts could be run through the shredder, and that vibrations were a necessary, unpreventable happenstance due to the nature of the shredder's operation. The circuit court so modified the conditions of operation granting a 36% increase in operating hours. Superior had originally argued the same and had been originally so operating as the new conditions allowed before the original state court action.

In December of 1986, the successor obtained a dismissal of permanent injunction and the suit.

In the November 21, 1979 memo of the Respondent the City notes "to make it more difficult for Superior to have the necessary funds to cure any operation of

the shredder." A. 29.

In response to the hearing examiner, the Edison Neighborhood Council (local complaining residents) submitted a letter to the Respondent indicating the hours of operation were irrelevant if the shredder was not creating a nuisance. A. 30. Attached hereto is the Defendant there, Superior's, answer and counter-complaint to the Respondent's Complaint. A. 32.

Attached is an 8 page summary of events commencing with the restrictions imposed by the City Hearing Officer on Petitioner, the changes for the successor (Ferrall) operator up until the time of the order dismissing the entire suit on December 5, 1986. A. 35.

In 1980 the Respondent brought the state court action in Michigan against Petitioner's predecessor Superior to enjoin Superior from operating without the license revoked by Respondent, City of Kalamazoo.

Superior filed a conter-complaint alleging the license "was revoked without due process of law" and the Respondent has and is attempting to "force and compel Superior to cease operations". A. 32.

Superior remained operating for almost four years until the Chapter 7 liquidation bankruptcy.

On October 15, 1984, the state court issued a permanent injunction prohibiting Superior from operating and dismisses the state court suit. In 1986, a successor new owner of the shredder, having reopened

the case again gets the case dismissed after this new owner is granted a 36% increase in operating hours, Superior never had.

Petitioner then files in 1987 in Federal District Court a "Federal", U.S. Constitution, Amendment 5, and "State" taking claim which is then dismissed under Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172 (1985) as not "ripe", "no federal jurisdiction" as Petitioner had not pursued available state compensation. A. 14.

Petitioner files in 1989 in the Michigan state court "federal" and "state" taking claims which are dismissed on principle of state "res judicata", the state court ruling that Petitioner had raised, or could have raised the taking claim in the original 1980 state court action. An appeal to the Michigan Court of Appeals is affirmed (unpublished opinion), holding plaintiff "could have filed a specific taking claim in its 1980 counter-claim, but did not . . its taking claim in the instant suit is barred by res judicata . . we find no merit in (Petitioner's) argument that a taking claim became ripe only after the permanent injunction issued October 15, 1984. Plaintiff could have brought an action for a temporary taking after defendant (here Respondent) revoked its license in 1980. . Plaintiff's claim that the taking claim did not accrue until it filed for

bankruptcy is equally meritless." A.24. The Michigan Supreme Court denied leave to appeal. A.28. Petitioner filed a petition for a Writ of Certiori with this court which was not perfected.

On July 26, 1995, Petitioner filed a second federal district court action pursuant to 42 U.S.C. §1983, A.47, alleging a "federal taking", U.S. Constitution, Amendment 5; Amendment 14, against Respondent. It is dismissed by the Federal District Court on principle of "Full Faith and Credit", A.46, as being barred by principles of res judicata. A.14. Petitioner appealed to the Sixth Circuit Court of Appeals which rendered its per curiam unpublished opinion affirming the District Court's opinion finding a "prior state adjudication has the same effect in federal court as it would in state court". . there is nothing to suggest that the Michigan circuit court lacked jurisdiction to hear (Petitioner's) claim, Petitioner's current argument . . . is the same contention raised by Superior in its 1980 counter-complaint and in the 1989 state court action. . . Plaintiff raises no new theories of liability and offers no new facts or evidence, Superior easily could have raised a pure "taking" claim during either or both of the prior proceedings . . . Remus may not collaterally attack the state court's determination "of res judicata." A. 1.

REASONS FOR GRANTING THE WRIT

UNDER THE "FULL FAITH AND CREDIT" PROVISION, TITLE 28, U.S.C. §1738, A. 46 PETITIONER'S CLAIM OF A "FEDERAL TAKING" IS NOT PRECLUDED UNDER THE STATE OF MICHIGAN RULE OF "RES JUDICATA" FOR THERE IS NOTHING TO GIVE "FAITH OR CREDIT" TO THE STATE OF MICHIGAN TRIAL AND/OR APPELLATE COURTS.

As is universally held, a court only has jurisdiction of a "federal taking" claim after the party has first attempted to use the available state procedures for compensation, if they exist, for the federal taking claim is not "ripe" for adjudication. Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172, 175 (1985); Marcene v MJW Inc., 951 F 2d 700, 704 (6th Cir. 1991).

No claim for a "federal taking" exists until compensation has been denied under applicable state proceedings. Id. Petitioner was compelled to use the state court appellate process to have compensation denied.

A justifiable dispute is a jurisdictional prerequisite under the Federal Constitution, Article III. Allen v Wright, 468 U.S. 737, 750 (1984). Without a "justifiable dispute" the Federal Courts had no basis to retain jurisdiction of the original (1987) filing before it. This preposition was correctly

decided by Hon. Judge Gibson in his original decision, 1-6-1989, on Petitioner's first filing a federal "taking" claim. A. 14.

A federal cause of action not "ripe" (no jurisdiction to hear) is not precluded under a theory of "Res Judicata" when the federal claim is not ripe at any time during the pendency of the prior state court action. Katt v Dykhouse, 983 F.2d 690 (6th Cir. 1992).

This principle is the same for the State of Michigan. Hart v City of Detroit, 416 Mich 488 (1982); Grand Trunk Western RR v Detroit, 326 Mich 387 (1949).

Additionally, no "taking claim", whether state or federal "accrues" (comes into existence) until the dispute which may or may not amount to a taking has been decided and "stabilized". Williamson Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172 (188-94) (1985); United States v Dickerson, 331 U.S. 745, 749 (1947); Hart v City of Detroit, 416 Mich 488 (1982).

The State of Michigan has additionally held:

> A "taking claim" is an independent action, and it is the finality of the decisionmaker's decision that is an issue. Final decisions are not rendered less final because they are appealable. A taking claim is not a collateral attack on the decisionmaker's decision.

Miller Brothers v Department of Natural Resources, 203 Mich App 674 (1994). The State Court would never acknowledge their own law. A. 24.

Federal law conforms with Michigan law. Under 42 §1983, A. 47, Petitioner was not required to exhaust his remedy by attacking the ordinance, contesting the revocation of his license or appealing the underlying 1980 court action. Williamson Planning Commission v Hamilton Bank, 473 US 172; 174 (1985); Patsy v Florida Board of Regents, 457 US 496 (1982). "Taking" claims have unique characteristics that cause them to differ from all other types of claims under Title 42, §1983. "Taking" are a "postdeprivation process". Id. 195.

Petitioner concedes that had Petitoner's business been "shut down" in 1980, the "taking cause of action" would have accrued. But the property was not lost until 1984. From 1980 to 1984, this case is analagous to Williamson Planning, supra. The parties are still jockeying for position. Here, the Petitioner finally had none.

The state courts never understood it was the Respondent's first lawsuit in the State Court and the Respondent's actions therein that were the "cause of action" for a "taking". Petitioner's cause of action while that case was pending was not "ripe", federally or stately. Filing for Chapter 11 bankruptcy reorganization cannot be a "taking". Merely losing one's license cannot be a "taking".

The letter from the Respondent indicating they would "make it as difficult as possible", A.29, during the pending of that action is Petitioner's "taking".

Michigan Res Judicata

Res Judicata or "claim" preclusions prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding, Eliason Corporation v Bureau of Safety & Regulations of Michigan Department of Labor, 564 F. Supp 1298 (W.D. Mich 1983); Gore v Monroe Auto Equipment Co., 409 Mich 147, 294 N.W. 2d 165 (1980); provided (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits; In re Pardee, 190 Mich App 243, 475 N.W. 2d 870, 873 (1991), and (4) arises out of the same transaction, (acts done before one files suit), Gore v Monroe Auto Equipment, 409 Mich 147, 160 (1980); and (5) same facts or evidence are essential to the maintenance of the two actions Jones v State Farm Ins. Co., 202 Mich App 393, 401 509 N.W. 2d 829 (1993).

The two cause of actions, the "nuisance" suit and the "taking" suit are different transactions. The first does not have to be appealed to bring the second, nor is it precluded by "res

judicata".

Michigan has long held that a decision by a court is controlling res judicata until contradicted, reversed, or overruled by the court. Tebo v Hawlik, 418 Mich 350, 362, 379 (1984). The final judgment in the State's nuisance action was decided in Petitioner's favor when the successor gets a 36% increase in operating hours, the state case dismissed and the Respondent's regulations are found unreasonable. This action takes place after Petitioner's loss of the property and the Michigan 21 day period to appeal the permanent injunction. Who could have possibly forseen a new owner getting a 36% increase in operating hours.

Federal "Full Faith and Credit"

The Federal District Court of Western Michigan, A. 14, and the Sixth Circuit Court of Appeals, A. 1, based its ruling on Title 28 U.S.C. §1983, A. 46, which mandates that the federal courts give a prior state court adjudication the same effect it would have in a state court. However under Michigan law "lack of subject matter jurisdiction makes the decision absolutely void" Fox v Board of Regents of University of Michigan, 375 Mich 238 (1965); A Michigan court is "free to disregard an order void for lack of (subject matter) jurisdiction", Matter of Hague, 412 Mich App 532-544 (1982); "Lack of subject matter jurisdiction can be

collaterally attacked"; "A proven lack of subject matter jurisdiction renders a judgment void"; "it is the initial pleadings that give subject matter jurisdiction," In Re Hatcher, 433 Mich 426, 438, 439 (1993).

If "Full Faith and Credit" is the issue, the federal court, like the state courts, could not follow the second state court decision.

The "federal taking claim" is now ripe in the federal court.

"Catch 22"

In the book "Catch 22" you were sane if you flew your bombing missions if you thought only an insane person would so do; if you loved flying the missions you were insane, but this was what was wanted - you flew your missions. Some "catch".

In 1980 in state court, the Respondent files suit to enjoin Petitioner's primary operation of its business without a license. Petitioner's counter-claim there, relied upon by the state and federal courts says:

> "Paragraph 7: That at said hearings Counter-Defendant (Respondent here) unreasonably, arbitrarily, and without any pretense of due process. . by Michigan and Federal Case Law, revoked said license". .
>
> "Paragraph 8: That this

> revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished. . and void and of no effect under the constitution . . .
>
> "Paragraph 9: That the defendant's counter plaintiff. . have attempted to enforce through this court and through other proceedings and threatened to attempt to enforce this ordinance and the revocation of this license and to force and compel counter plaintff (Petitioner here) to cease operations." A. 32.

Paragraphs "7" and "8" are an attack on the reasonableness -unreasonableness of the revocation of his license. Paragraph "9" is a notification of the threatened ceasing of operation. These do not allege a "taking", nothing is lost.

Petitioner's predecessor continued to operate on and off until October 15, 1984 when it is permanently prohibited. In February 1986 the successor owner of the shredder, moved in State Circuit Court to set aside the permanent injunction, and commence operations. It happens. The shredder is once again operating as it originally was when Petitioner's privy (Superior) operated the shredder. It runs today. Petitioner's predecessor and

successor won in the 1980 state court proceeding getting a 36% increase in operating hours.

Petitioner files in (1987) in Federal Court, both a Federal and State "taking claim" against the Respondent which is promptly dismissed because Superior has not "utilized (state) procedures for obtaining compensation before bringing a 1983 action". A. 14.

Petitioner then filed (1989) in the State of Michigan Courts a State and Federal "taking" claim, the federal claim the Respondent has just successfully argued in federal court is not ripe for adjudication anywhere.

Respondent then moves for summary judgment alleging the State and Federal claim (not ripe in 1987), have been decided by the 1980 original lawsuit - res judicata - as "the same claim raised in Superior's earlier counter claim, which had been dismissed with prejudice . . .or if not previously raised could have and should have brought as an affirmative defense in the earlier action". The 1989 "State" case is barred by "res judicata". Some "catch". Respondent has both sides of the coin.

Petitioner appeals the State Circuit Court's decision, and the State Court of Appeals rules:

> "Plaintiff could have filed a specific taking claim in its 1980 counter claim, but did not.

> This we hold that its taking claim in the instant suit is barred by res judicata. . we find no merit in plaintiff's argument that a taking claim became "ripe only after the permanent injunction issued on October 15, 1984". Plaintiff might have brought an action for a temporary taking after defendant revoked its license in 1980 . . Plaintiff claims that the taking claim did not accrue until it filed for bankruptcy is equal meritless". A. 24.

A "temporary taking" means the property is "took" for a period of time, not that someone is "trying to take", or has diminished the value of or use of. The latter is regulation - not a taking. The mere revocation of a license is not a "taking".

Some "catch". Not a single federal case is cited in the Michigan Court of Appeals decision, nor does the Court speak of or distinguish state from federal takings.

The petition to Federal Bankruptcy Court for "corporate reorganization and relief from creditors" does not take the property and remove it from the ability of Superior to profitably operate. Hart, supra, beyond establishing the six-year Statute of Limitation, stands for the proposition that where there is a claim of injury to property, in order for the statute to commence running, the consequences of the

wrong or the "de facto taking" upon the Plaintiff by the Defendant must have "stabilized" in order for the limitation to run. Hart, supra, 504. If there is no "stabilization", the cause of action is not "ripe", under State Law, certainly not under federal law.

As noted in Agins v Tiburn, 447 U.S. 255, 65 L.Ed. 2d 106, 100 S.Ct. 2138, note 9:

> "Fluctuations in value during government decision making is not a taking. There is no controversy yet".

There is no taking in 1980 under the rationale of Agins, supra, since the actions of the City resulting in the impairing of this Plaintiff's ability to operate had not "stabilized". The "consequences" of the City's action did not stabilize until Petitioner was forced into a full Chapter 7 bankruptcy, on October 4, 1984. Petitioner's equal protection claim did not accrue until the successor was treated differently.

Petitioner files in Federal Court a ripe federal cause of action for a "taking", (1995). Defendant argues res judicata (the state proceedings) having previously argued Petitioner's claim not "ripe" for adjudication in federal court. Some catch.

The District Court rendered its opinion dismissing plaintiff's federal

complaint, on principles of "res judicata":

> "Similarly, plaintiff argues that the federal constitutional claim that he asserted in his 1989 case action was not ripe. However, plaintiff had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments, and the Michigan Court of Appeals addressed this issue. Plaintiff may not collaterally attack the state court's determination. Insurance Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982)." A. 14.

In affirming the District Court's opinion, the Sixth Circuit Court of Appeals ruled:

> "In addition, Remus argues that the federal constitutional claim asserted in his 1989 state court action was not ripe. However, Remus had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments there, and the Michigan Court of Appeals addresses this issue. Remus therefore may not collaterally attack the state court's determination. Ins. Corp of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 US 694,

> 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment")" A. 1.

This footnote cites two cases. Chicot County Drainage District v Baxter State Bank, 308 US 371 (1940); and Stoll v Gottlieb, 305 US 165 (1938). These cases involve an original action filed in fedeal court, an affirmative ruling for the plaintiff, the defendant then initiating a state court proceeding on the issue of subject matter jurisdiction to prohibit the affirmation ruling in the original federal suit, and the ruling that the defendant, now plaintiff in the state court proceedings, should have appealed the federal court decision on "subject matter jurisdiction".

Applying these two cases to the present action it was Respondent, who if it did not like the original decision (federal 1987) regarding the lack of subject matter jurisdiction, should have appealed that decision. It was Respondent who collaterally attacked Judge Gibson's decision in the second state court proceeding. "Full faith and credit" under these two decisions cannot be given.

Had Petitioner perfected its first Application for Certiori the decision must have been the state court did not have jurisdiction of the federal claim. This

decision leaves Petitioner remediless and makes no sense. The statute of limitations would have run.

The Sixth Circuit Court of Appeals likewise so held and went on to state "there is nothing to suggest that the Michigan Circuit Court lacked subject matter jurisdiction to hear Remus' claim". A. 2. Either the Federal District Court in 1987 is wrong or the Sixth Circuit Court of Appeals in 1997 is wrong as is wrong the 1980 state case or the 1989 state case. The state 1980 (issue in flux), federal 1987 (exhaust state taking - no ripeness), state 1989 (res judicata in 1980), and federal 1995 (res judicata in 1980) cases and court opinions are irreconcilable except under Petitioner's theories.

As Michigan defines Res Judicata, whether or not plaintiff did or did not allege a federal taking in its State action, is immaterial. That which could have been alleged is also precluded under the state theory of Res Judicata. Had plaintiff not alleged a federal taking cause of action he would still be bound, if it existed, by Michigan's theory of Res Judicata. Some "catch".

There is not a single reference in the Michigan Court of Appeals Decision to the "federal taking", or a single federal case noted.

Petitioner is entitled to a "full and fair opportunity to be heard" on its federal claim in state court. If not, any

Title 42 §1983 is not barred by state law "res judicata". Keemer v Chemical Construction Corporation, 456 U.S. 461 (1982); Allen v McCurry, 449 U.S. 90 (1980). Where the federal claim cannot be asserted the Petitioner could hardly be afforded a hearing, fair or otherwise. Davidson v Capuano, 792 F.2d 275 (2nd Cir. 1986); Miller v Hartwood Apartments, 689 F.2d 1239 (5th Cir. 1982), nor where the state judicial review was narrow and conclusionary. Scroggins v Kansas, 802 F.2d 1289 (10th Cir. 1986).

The State of Michigan is unable or unwilling to protect Petitioner's Federal Constitutional rights.

Some "full and fair opportunity to be heard".

The only explanation is the state knew there was no federal claim before it to decide and the state courts realized that they did not have federal claim jurisdiction. Federal taking claim is not distinguished from that of the state claim in the state courts.

Title 42, § 1983, A. 47, will overcome a claim of State Res Judicata where the state law does not provide a full and fair opportunity to litigate the claim or issues presented to it. Allen v McCurry, 449 U.S. 90 (1980).

The United States Supreme Court has no authority to review a state court decision based solely on state law.

But it gets worse.

In the prior state case, Petitioner's

here, Defendant's there, counterclaims and affirmative defenses were simply dismissed. Defendant's there, Petitioner's here, claims were never decided on the merits. There being no trial or nothing amounting to a hearing on any of those claims. The State Circuit Judge took "testimony" to the extent it was taken in a curious manner. The state court asked people to rise in the audience, make unsworn statements on the record, and took "statistical information" by simply asking them to testify by raising their hand and voting on certain issues. The judge permitted unsworn "witnesses" from the audience to read from letters of others.

In this hearing in 1984, four years into the lawsuit, the judge concludes·

> "I am convinced. . . that vibrations through the earth operate in strange ways". . . "to show you in simple terms, without any legal jargon, if I can, the City of Kalamazoo wants to shut down Mr. Rosenberg, (the operative word here is "wants").

When the above is coupled with the State of Michigan Appeal Court decisions, unpublished, in direct conflict of Michigan's published law. Petitioner has never had a "fair and full" opportunity to litigate its "federal taking" claim.

What has happened here is only to one citizen.

If the State of Michigan wishes to make the revocation of a license a "taking", or the "filing of Chapter 11" "reorganization" bankruptcy a "taking", so be it.

If the State of Michigan wishes to say as of the 1980 filing of the first state action is a "taking", so be it.

Federal law supports none of these propositions.

Events may lead to a state "taking" that are not yet a federal "taking".

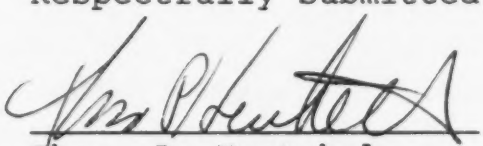
So it is here when the State of Michigan denied compensation Petitioner's federal taking claim accrued.

"Full Faith and Credit" does not apply.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari or in the alternative, simply remand this matter to the trial court for trial as the issue is clear.

Respectfully Submitted,



Theo. P. Hentchel
(Counsel of Record)
165 Capital Ave. N.E.
Battle Creek, MI 49017
(616) 962-4841

Dated: December 17, 1997

(2)

Supreme Court, U.S.
FILED

97 1016 DEC 19 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD C. REMUS, TRUSTEE FOR
SUPERIOR METAL SHREDDERS, INC.,
Petitioner,

v.

CITY OF KALAMAZOO,
Respondent.

On Petition For A Writ of Certiorari
From The United States Court of Appeals
For The Sixth Circuit

APPENDIX TO PETITIONER'S PETITION FOR WRIT OF CERTORARI

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Attorney for Petitioner

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-2200

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Appellant,

v.

CITY OF KALAMAZOO,

Appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

PER CURIAM. Richard C. Remus, bankruptcy trustee for Superior Metal Shredders, Inc., appeals the district court's grant of the City of Kalamazoo's motion for summary judgment and dismissal of his "takings" claim under the doctrine of res judicata. For the reasons set forth below, we **AFFIRM** the lower court's decision.

I.

Superior Metal Shredders, a recycling and salvage company, operated an automobile shredder in the City of Kalamazoo. Superior continued to operate the shredder even after the City revoked its license.

The 1980 State Court Action

In 1980, the City brought a state court action against Superior to enjoin it from operating the shredder without a license. Superior filed a counter-complaint alleging that the City's revocation of its license violated its rights under the Michigan and United States Constitutions. Superior also alleged that the City had "unreasonably and unjustly, arbitrarily and without cause harassed [Superior] and caused the shut-down of [Superior's] business activities to the extent that [Superior] ha[s] found it necessary to submit to reorganization." (J.A. 133) In fact, Superior did file for bankruptcy on October 4, 1980. In September 1984, Superior's Chapter 11 bankruptcy petition was converted to a Chapter 7 liquidation proceeding, and the bankruptcy court appointed Richard C. Remus as bankruptcy trustee.

On October 15, 1984, the state court issued a permanent injunction prohibiting superior from operating the shredder. The court dismissed the City's action, including Superior's counter-complaint, with prejudice. Neither David Rosenberg, the former owner and sole shareholder of Superior, nor trustee Remus appealed this decision. Through the bankruptcy court proceedings, superior was dissolved and the assets of the company sold to an unrelated third party, Kalamazoo Metal

Recycling, Inc.

The First Federal District Court Action

Rosenberg then filed an action in United Stated district court, alleging that the City deprived him of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 10, Section 2 of the Michigan Constitution. Upon the City's motion, the district court dismissed the complaint for lack of subject matter jurisdiction pursuant to Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 US 172 (1985). Williamson holds that a property owner cannot claim a violation of the takings clause until it has used any available adequate state procedures for obtaining just compensation and been denied such compensation. Id. at 186-87. The district court found that Superior had not pursued available state procedures to obtain compensation, and thus held that Superior's takings claim under the federal Constitution was not ripe for adjudication. Accordingly, the district court, in an order dated January 6, 1989, dismissed this claim and Superior's pendent claim under the Michigan Constitution.

The 1989 State Court Action

In September 1989, trustee Remus

filed an action in Michigan state court alleging that the City had taken Superior's property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 10, Section 2 of the Michigan Constitution. The trial court found that Superior either had raised the claims, or could have raised them in the 1980 state court action. Accordingly, the court held that the action was barred by the doctrine of res judicata and granted the City's motion for summary judgment. The Michigan Court of Appeals affirmed the trial court and denied Remus' subsequent motion for a rehearing, and the Michigan Supreme Court denied leave to appeal. Remus then filed a petition for writ of certiorari with the United States Supreme Court. However, when Remus failed to cure certain defects in the petition, it was ultimately rejected and never docketed.

Proceedings Below

On July 26, 1995, Remus brought the present suit in federal district court pursuant to 42 U.S.C. §1983, alleging that the City deprived Superior of its property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In response, the City filed a motion to dismiss and for summary judgment. On August 15, 1996, the district court issued an opinion and a

judgment order, granting the City's motion and dismissing Remus' claim on the ground that it was barred by the doctrine of res judicata. The court based this ruling on the full faith and credit provision of 28 U.S.C. §1783, which mandates that federal courts give a prior state court adjudication the same effect it would have in state court. The court found that Michigan courts had determined that the 1989 state court action was barred by the doctrine of res judicata, and thus ruled that because the present suit was virtually identical to the 1989 state court action, res judicata acted to bar the current suit. Finally, the district court rejected Remus' claim that the state courts had wrongly decided the res judicata issue, stating that only the United States Supreme Court may review the state courts' determination. This appeal timely followed.

II.

This Court reviews a district court's grant of summary judgment de novo, applying the same test as that used by the district court in reviewing a motion for summary judgment. Barnhart v Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1388 (6th Cir. 1993) (quotations and internal citations omitted). Summary judgment is appropriate when the record reveals that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v

Catrett, 477 U.S. 317, 322-23 (1986).

In reviewing a motion for summary judgment, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirements that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original). Thus, once the movant has satisfied its initial burden of demonstrating that the non-movant has no evidence to support an essential element of its case, the non-movant must respond by presenting evidence that demonstrates a genuine issue of material fact. A mere "scintilla" of evidence is insufficient to withstand summary judgment. Id. at 252. Finally, this Court must affirm the lower court's grant of summary judgment if it is correct for any reason, even one that the lower court did not consider. Silver v Franklin Township Bd. of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992).

The district court found that Remus' claim was barred by the doctrine of res judicata. On appeal, Remus argues that the district court improperly applied the full faith and credit clause of 28 U.S.C. §1783 to reach this conclusion. Upon

review of the case, however, we find no reason to disturb the district court's finding. Section 1783 of Title 28 of the United States Code requires that federal courts give state court decisions the same full faith and credit that they would receive "in the courts of such state". Thus, a prior state court adjudication has the same effect in federal court as it would in state court. Marrese v Am. Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985).

The doctrine of res judicata applies to claims premised upon 42 U.S.C. §1983 that were previously litigated in state court. Migra v Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under Michigan law, res judicata, or claim preclusion, prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding. Eliason Corp. v Bureau of Safety & Regulation of Michigan Dept. of Labor, 564 F.Supp. 1298 (W.D. Mich. 1983). Under the doctrine, a subsequent legal action is barred if: (1) the parties or their privies are the same; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was a final judgment on the merits; and (4) the two suits involve the same cause or causes of action that are brought, or could have been brought, in the prior litigation. Allen v McCurry, 449 U.S. 90, 94 (1980); Brownridge v Michigan Mut. Ins. Co., 115 Mich App 745,

748-49 (1982).

The district court properly gave full faith and credit to the Michigan circuit court's res judicata determination, as the elements of the doctrine have been met in this case. First, the parties in the two state court actions are properly treated as the same; trustee Remus possesses only those rights possessed by the debtor-corporation and "the trustee stands in the shoes of the debtor", Superior. Matter of Light, 23 B.R. 482, 484 (Bankr. E.D. Mich. 1982). Second, there is nothing to suggest that the Michigan circuit court lacked jurisdiction to hear Remus' claim.

Third, the circuit court's 1984 dismissal of Superior's claim with prejudice constitutes a final judgment on the merits for purposes of applying res judicata. Brownridge, 115 Mich App at 748. A trial, witnesses, or a written opinion are not necessary so long as the parties have had an opportunity to be heard. See e.g., Eliason Corp., 564 F. Supp. at 1301 (holding that a dismissal for lack of progress can constitute adjudication on the merits, where there was "individualized consideration, in which the trial court considers all the pertinent circumstances of a particular case . . .").

Fourth, the present suit involves the same cause or causes of action that were brought, or could have been brought, in prior litigation. Indeed, Remus' current argument - that the City, by regulating

Superior's operation of the shredder, rendered it economically unviable and thus "took" Superior's property - is the same contention raised by Superior in its 1980 counter-complaint and in the 1989 state court action. In Michigan, "[t]he test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." Jones v State Farm Mut. Auto Ins. Co., 202 Mich. App. 393, 401 (1993) (internal citation omitted). It is irrelevant whether the grounds asserted for relief are similar. Id. at 401.

The plaintiff in this case raises no new theories of liability and offers no new facts or evidence in support of this most recent action. The cases thus involve the same matter or issue; the very words in the complaint are identical to his earlier effort, duplicated verbatim into the current complaint. The district court was therefore correct in holding that Remus' claims were barred by res judicata.

Moreover, even if Remus' current claim is viewed as being different from Superior's 1980 counter-complaint, Superior easily could have raised a pure "takings" claim during either or both of the prior proceedings. The City argued, and the Michigan courts concluded in 1990, that Superior raised a takings claim in the prior (1980) suit by alleging, in its

counter-complaint, that the City's "unreasonable" and "arbitrary" regulation of the shredder "caused the shut down of [its] business activities." That counterclaim was dismissed with prejudice by the state court and Remus is therefore barred from relitigating it here. However, even if this Court concludes that Superior did not raise a takings claim in the first state court action, Remus' action is still barred by the doctrine of res judicata under Michigan law because Superior could have and should have raised a takings claim in that prior action.

Remus also argues that the state courts wrongly decided the res judicata issue, and thus that the district court improperly granted full faith and credit to their decision on that issue. It is, however, well settled that only the United States Supreme Court may review a determination of a state's highest court. In re Sun Valley Foods Co., 801 F.2d 186, 189 (6th Cir. 1986). A United States district court "has no authority to review final judgments of a state court in judicial proceedings." Id. (quoting District of Columbia Court of Appeals v Feldman, 460 U.S. 462, 482 (1983).

In addition, Remus argues that the federal constitutional claim asserted in his 1989 state court action was not ripe. However, Remus had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments there, and the Michigan

Court of Appeals addresses this issue. Remus therefore may not collaterally attack the state court's determination. Ins. Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment.").

III.

Accordingly, we hold that the district court properly found the present suit barred by the doctrine of res judicata, and hereby **AFFIRM** the district court's grant of the City's motion for summary judgment and dismissal of Remus' claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

File No. 4:95-CV-136

Plaintiff,

Hon. Benjamin F. Gibson

v.

THE CITY OF KALAMAZOO,

Defendant.

JUDGMENT

_____/

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan this 15th day of August, 1996.

PRESENT: HON. BENJAMIN F. GIBSON,
U.S. DISTRICT JUDGE

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that defendant's motion to dismiss and motion for summary judgment (pleading no. 7) is GRANTED.

IT IS FURTHER ORDERED that JUDGMENT is granted for defendant the City of Kalamazoo and against plaintiff Richard C. Remus, Trustee for Superior Metal Shredders, Inc.

IT IS SO ORDERED.

Benjamin Gibson
US District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Plaintiff,

File No. 4:95-CV-136

Hon. Benjamin F. Gibson

v.

THE CITY OF KALAMAZOO,

Defendant.

OPINION

---/

Richard C. Remus, bankruptcy trustee for Superior Metal Shredders, Inc. ("SMS"), brings this action against the City of Kalamazoo ("the City") pursuant to Title 42 United States Code Section 1983, alleging that the City deprived SMS of its property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In response, the City requests that the Court dismiss the complaint or enter summary judgment in its favor. For the following reasons, the Court will grant the city's motion.

I.

A.

SMS, a recycling and salvage company,

operated an automobile shredder in the City of Kalamazoo. After the City revoked SMS's license, SMS continued to operate the shredder. In 1980, the City brought a state court action against SMS to enjoin its operation of the business without a license and to abate a nuisance. SMS filed a counter-claim alleging that in revoking the license the City violated SMS's rights under the Michigan And United States Constitutions. Counter-claim at ¶ 8. SMS further alleged that the City had "unreasonably and unjustly, arbitrarily and without cause harassed Counter-Plaintiff and caused the shut-down of Counter-Plaintiffs' business activities to the extent that the Counter-Plaintiffs have found it necessary to submit to Federal Bankruptcy Court for the purpose of corporate reorganization." Counter-claim at ¶ 10.

In September 1984, upon motion of SMS's creditors, SMS's Chapter 11 petition was converted to a Chapter 7 liquidation proceeding. The Bankruptcy Court appointed Richard Remus bankruptcy trustee.

On October 15, 1984, the state court issued a permanent injunction, prohibiting operation of the shredder. The court dismissed the action, including SMS's counter-claim, with prejudice. Neither David Rosenberg, the former owner and sole shareholder of SMS, nor trustee Remus appealed this decision.

SMS was dissolved and Remus sold the

company's assets. Thereafter, Kalamazoo Metal Recycling, Inc., an unrelated company, purchased the assets from the first purchaser. Upon Kalamazoo Metal Recycling, Inc.'s motion, and over the City's objection, the state court dissolved the permanent injunction, allowing that company to operate the shredder.

B.

Rosenberg then filed an action in this Court, alleging that the City deprived him of property without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 10, Section 2 of the Michigan Constitution. Upon the City's motion, the court dismissed the complaint for lack of subject matter jurisdiction under Williamson County Regional Planning Comm'n v Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

To review the applicable law, the Fifth Amendment proscribes governmental taking of private property without just compensation. [1] No federal constitutional violation occurs until just compensation

---

1"The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation.' The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment." McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 342 n.1 (1986) (citations omitted).

is denied. A federal takings claim becomes ripe only after a claimant has used the available state procedure and has been denied just compensation. Williamson, 473 U.S. at 195; see also Bigelow v. Michigan Dep't of Natural Resources, 970 F.2d 154, 158 (6th Cir. 1992); Macene v. MJW, Inc., 951 F2d 700, 704 (6th Cir. 1991).

Plaintiff had not pursued the available state procedure and so had not been denied just compensation. Therefore, plaintiff's takings claim under the federal Constitution was not ripe for adjudication. Accordingly, on January 6, 1989, the Court dismissed the federal claim and plaintiff's pendent claim under the Michigan Constitution.

In September 1989, bankruptcy trustee Remus filed a state court action against the City alleging a taking without just compensation, under both the state and federal Constitutions. The state court complaint included two counts: Count I, State Taking; and Count II, Federal Taking. In his state court complaint, plaintiff alleged as follows:

> This is an action to redress the deprivation under color of the City of Kalamazoo's local ordinance of a privilege secured to the Plaintiff under the 5th Amendment to the United States Constitution and 14th Amendment to the United States Constitution and under Article

> 10, Section 2 of the Michigan Constitution of 1963 for a taking of private property by the Defendant, City of Kalamazoo, without just compensation, a right and privilege afforded to all persons within the jurisdiction of the United States and the State of Michigan.

The state trial court found that plaintiff either had raised the claims, or could have raised them in the 1980 state court action. Accordingly, the court held that the action was barred by res judicata and granted the City's motion for summary disposition. The Michigan Court of Appeals affirmed. After the Michigan Court of Appeals denied plaintiff's motion for a rehearing, the Michigan Supreme Court denied leave to appeal. Plaintiff did not file a petition for writ of certiorari with the United States Supreme Court.

Thereafter, plaintiff filed the instant action pursuant to Title 42 United States Code Section 1983, alleging that the City deprived SMS of its property without just compensation, in violation of the federal Constitution. In his complaint, plaintiff alleges as follows:

> This is an action to redress the deprivation under color of the City of Kalamazoo's local ordinance of a privilege secured to the plaintiff under the 5th

Amendment to the United States Constitution and the 14th Amendment to the United States Constitution for a taking of private property by the defendant, City of Kalamazoo, without just compensation, a right and privilege afforded to all persons within the jurisdiction of the United States.

Paragraph 3.

In response to the complaint, the City argues that this action is barred both by the doctrine of res judicata and by the statute of limitations.

II.

In reviewing defendants' request for dismissal, the Court must accept as true the material allegations in plaintiff's complaint. Summit Health Ltd. v. Pinhas, 500 U.S. 322, 325 (1991). The Court must construe the complaint in the light most favorable to plaintiffs. However, the Court is not required to accept as true plaintiffs' legal conclusions or any unwarranted factual inferences. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c); Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

III.

The City first argues that plaintiff's claim is barred by the doctrine of res judicata. Title 28 United States Code Section 1738 requires that federal courts give state court decisions the same full faith and credit that they would have "by law or usage in the court of such State." Thus, a prior state court adjudication has the same effect in federal court as it would in state court. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). The doctrine of res judicata applies to claims premised upon Title 42 United States Code Section 1983 which previously were litigated in state court. Migra, 465 U.S. at 81-85.

Under Michigan law, res judicata or claim preclusion prevents a plaintiff from litigating a claim that actually was litigated or court have been litigated in an earlier proceeding. Ellison Corp. v.

Bureau of Safety & Regulation of Michigan Dep't of Labor, 564 F. Supp. 1298 (W.D. Mich. 1983); Gose v. Monroe Auto Equipment Co., 409 Mich. 147, 294 N.W.2d 165 (1980); Carter v. Southeastern Michigan Transp. Authority, 135 Mich. App. 261, 351 N.W.2d 920, 921 (1984). Claim preclusion requires that: (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits. In re Pardee, 190 Mich. App. 243, 475 N.W.2d 870, 873 (1991).

First, plaintiff asserted a takings claim under the federal Constitution in the 1989 state court action; he asserts the same claim here. Second, the parties to the actions are the same. Third, the state courts determined that the 1989 stat court action was barred by the doctrine of res judicata.

Plaintiff now argues that the state courts wrongly decided the res judicata issue. However, only the United States Supreme Court may review the state courts determination. In re Sun Valley Foods Co., 801 F2d 186, 189 (6th Cir. 1986) (citations omitted). This court "has no authority to review final judgments of a state court in judicial proceedings." Id. (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). "This is true, even though the state court judgment may have been erroneous." Id. (citations omitted).

Similarly, plaintiff argues that the federal constitutional claim that he asserted in 1989 state action was not ripe. However, plaintiff had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments, and the Michigan Court of Appeals addressed this issue. Plaintiff may not collaterally attack the state court's determination. Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment."); Welch v. District Court, 215 Mich. App. 253, 545 N.W.2d 15, 17 (1986) (citing In re Hatcher, 443 Mich. 426, 505 N.W.2d 834 (1993) ("A party may collaterally attack or challenge subject matter jurisdiction only on direct appeal."); Auditor General v. Olezniczak, 302 Mich. 336, 4 N.W.2d 679 (1942). Accordingly, the Court finds that the instant action is barred by the doctrine of res judicata.[2]

For the reasons set forth above, the Court will grant the City's motion to dismiss or for summary judgment.

---

[2]Because the Court so finds, the Court will not discuss defendant's arguments based upon the statute of limitations.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: August 15, 1996

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD C. REMUS, Trustee for
SUPERIOR METAL SHREDDERS, INC.,
Plaintiff-Appellant,
March 6, 1992

v

No. 133554

THE CITY OF KALAMAZOO,
a Michigan municipal corporation,
Defendant-Appellee.

Before Brenna, P.L., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiff through its bankruptcy trustee appeals as of right an order of the Kalamazoo Circuit Court granting defendant's motion for summary disposition. Plaintiff's sole issue on appeal is whether the circuit court erred by applying res judicata in barring its taking claim. We affirm.

After receiving complaints about nose, vibrations and pollution, defendant revoked plaintiff's license to operate its automobile shredder on December 16, 1980. Despite the revocation of its license, plaintiff continued to operate the shredder. Defendant then filed suit to enjoin plaintiff from operating the shredder without a license and to abate the nuisance. The circuit court issued a

temporary restraining order against plaintiff.

On December 23, 1980, plaintiff filed a counterclaim against defendant, alleging that defendant acted unreasonably and arbitrarily in revoking plaintiff's license and enforcing a city ordinance. Plaintiff's counterclaim further stated that as a result of the revocation of its license, plaintiff filed for bankrupt in federal court and that it would suffer irreparable injury if its license was not reinstated. The circuit court revoked the temporary restraining order and conditioned future operation of the shredder upon plaintiff's compliance with the conditions placed on the license.

After additional complaints from residents, the circuit court permanently enjoined plaintiff from operating the shredder on october 15, 1984. As part of that order, the circuit court dismissed with prejudice plaintiff's December 1980 counterclaim.

In September 1989, plaintiff filed the instant action against defendant, alleging that by virtue of the October 1984 permanent injunction, defendant had improperly taken plaintiff's property without just compensation as required by the federal and state constitutions. Following a hearing, the circuit court found that plaintiff's December 1980 counterclaim was essentially a taking claim. Since plaintiff's counterclaim was dismissed with prejudice, the circuit

court held that plaintiff's September 1989 complaint was barred by res judicata. Res judicata bars a subsequent suit between the same parties when the facts or evidence essential to the two suits are identical and the issues and parties or privies are identical. Ozark v Kais, 184 Mich App 302, 307; 457 NW2d 145 (1990). There are three prerequisites to applying the doctrine of res judicata: (1) the prior action must have been decided on its merit; (2) the issues raised in the second case have been resolved in the first; and (3) both actions must have involved the same parties or their privies. Richardson v DAHF, 180 Mich App 704, 708; 447 NW2d 791 (1989).

The first and third prerequisites for applying res judicata are met here. The circuit court dismissed with prejudice on October 15, 1984, plaintiff's counterclaim. An order dismissing an action with prejudice is a final judgment on the merits for the purpose of res judicata. Brownbridge v Michigan Mutual Ins.Co., 115 Mich app 745, 748; 321 NW2d 698 (1982). Both suits also involve the same parties. Richard Remes, as the bankruptcy trustee, stands in the shoes of the debtor corporation and has the right to bring whatever actions the debtor could bring on its own behalf. 9 Am Jur 2d, Bankruptcy, SS290, p 310. We believe that a trustee in bankruptcy has such an identification of interest with the debtor as to be in privy to represent the same

legal right as the debtor. Sloan v City of Madison Heights, 425 Mich 288, 295; 389 NW2d 418 (1986).

We next consider whether the taking issue could have been resolved in the prior action. Michigan courts have broadly interpreted the res judicata doctrine to hold that if the matter contested in the second suit could have been resolved in the first suit, but was not, res judicata bars the second suit. See Schwartz v City of Flint, 187 mich App 191, 194; 466 NW2d 357 (1991). Richardson, supra. Here, plaintiff could have filed a specific taking claim in its 1980 counterclaim, but did not. Thus, we hold that its taking claim in the instant suit is barred by res judicata.

We find no merit in plaintiff's argument that a taking claim became "ripe" only after the permanent injunction was issued on October 15, 1984. Plaintiff might have brought an action for a temporary taking after defendant revoked its license in 1980. See Poirier v Grand Blanc Twp. 167 Mich App 770, 777; 423 NW2d 351 (1988); lv den 431 Mich 913 (1988). Plaintiff's claim that the taking claim did not accrue until it filed for bankruptcy is equally meritless.

Affirmed.

/s/ Thomas J. Brennan
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

December 2, 1992

94118

RICHARD C. REMES, Trustee for
SUPERIOR METAL SHREDDERS, INC.,

Plaintiff-Appellant,
SC: 94118
v COA: 133554
LC: A89-002452-CC

THE CITY OF KALAMAZOO,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Inter-Office MEMO

City of Kalamazoo

To: Hon. Mayor Annen & City Commissioners
Date: November 21, 1979
From: Don M. Schmidt, City Attorney
Re: Superior Metal Shredders, Inc.

* * *

From the complaints that have been received from the neighbors, it appears the majority of the problems have not been solved and are still continuing, although it appears that there has been some improvement in the emission into the air of various materials, lessening of explosive occurrences, and a lessening in the level of vibration.

Another factor which you might wish to consider is that if Mr. Rosenberg is willing to invest money to solve these problems the loss of the tax exemption may make it more difficult for him to have the necessary funds to cure the operation of the metal shredder.

Respectfully submitted,

Don M. Schmidt
City Attorney

DMS:ws
cc: City Manager
City Clerk

EDISON CENTER
1331 RaceStreet, Kalamazoo
Michigan 49001 616/382-0916

August 11, 1980

To: Mayor Annen and Members of the City Commission

From: Edison Neighborhood Committee and E. Crosstown Pkwy. Block Club

Re: Proposed conditions of Recycling Dealers License for Superior Metal Shredder

If the license is reviewed, we recommend that the following stipulations be incorporated into the conditions proposed by Hearing Officer Martin (pages 15-17):

1. Hours of operation are irrelevant if Shredder is not creating a nuisance.
2. Acceptable as proposed by Deputy City Manager 8/7/80.
3. Acceptable as proposed by deputy City Manager 8/7/80.
4. The log referred to should be maintained on a daily basis.
5. Acceptable as proposed by the Deputy City Manager 8/7/80.
6. Acceptable as proposed by Hearing Officer Martin 6/23/80.
7. Veto: (#7 of Hearing Officer martin's report corresponds to #6 of Deputy City Manager Sculley's report.)
   a. The "regular ground vibration readings in the Crosstown Parkway neighborhood" should be conducted every week for an

eight-hour time period, with 300 vehicles processed. The City Manager should be provided with copies of all reports.

b. The maximum level of vibrations should be -60 dbgs, the level determined by Dr. Campanella to be the threshold of feeling.

We concur with the additional conditions recommended by the Deputy City Manager regarding payment of all outstanding taxes, fees, and bonds by August 13, 1980; and compliance with all State and City laws and ordinances.

We recommend that the City Commission add the following conditions:

9. The City Official charged with enforcement of this license shall be the Chief of Police.

10. The City Commission may immediately revoke this license unpon receipt of a verified complaint from the Chief of Police. This complaint, filed with the City Manager, must be presented to the City Commission within ten days.

11. Upon revocation of the Department of Natural Resources Permit to Operate, this recycling Dealers License shall automatically be repealed.

Basic Counselling
Allen Corp.
Senior Citizens
Emergency Services
Neighborhood Development

COUNTER-COMPLAINT IN STATE
1980 ACTION OF PETITIONER

* * *

7. That at said hearing Counter-Defendant unreasonably, arbitrarily and without any pretense of due process as that term is defined by Michigan and Federal Case Law revoked said license.

8. That this revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished by said ordinance and is void and of no effect and violative of the Constitution of the State of Michigan and the Constitution of the United States of American and the Fourteenth Amendment thereto.

9. That the Counter-Defendants and their respective agents and employees and persons acting under their control and direction have attempted to enforce through this court and through other proceedings and threatened to attempt to enforce this ordinance the revocation of this license and to force and compel Counter-Plaintiff to cease operation of their business all in the utmost bad faith and for political motives and for political gain.

10. That Counter-Plaintiffs have incurred expenses in excess of One Million Dollars ($1,000,000.00) to bring a much needed service and operation to the City of Kalamazoo and despite the fact that the Counter-Plaintiffs have complied with all

reasonable requests of the City of Kalamazoo, that the Counter-Defendant has unreasonably and unjustly, arbitrarily and without cause harassed Counter-Plaintiff and caused the shut-down of Counter-Plaintiffs' business activities to the extent that the Counter-Plaintiffs have found it necessary to submit to Federal Bankruptcy Court for the purposes or corporate reorganization.

11. That the continued harassment and revocation of Counter-Plaintiffs' license will result in irreparable injury to Counter-Plaintiff in that Counter-Plaintiff will be forced out of business permanently due to Counter-Plaintiff's many outstanding obligations and Counter-Plaintiff's inability to operate without a license from the City of Kalamazoo.

12. That since Counter-Defendant has already revoked the license of Counter-Plaintiff and informed Counter-Plaintiff that said license will not be renewed until April, 1981, if at all, Counter-Plaintiff has no adequate remedy at law.

WHEREFORE, Counter-Plaintiff prays that this Court grant Counter-Plaintiff the following relief in favor of the Counter-Plaintiff and against the Counter-Defendant.

A. A preliminary and permanent injunction restraining the Counter-Defendant from further proceedings either in Court or administratively to enforce the revocation of Counter-Plaintiff license to operate a metal shredder or a

recycling dealership in the City of Kalamazoo.

B. A declatory Judgment declaring that the revocation of Counter-Plaintiff's license to operate a shredding machine and recycling dealership license was in violation of due process clause of the United States Constitution and the Michigan Constitution and therefore void and of no effect.

C. That this is a claim for general relief.

D. That the Court award to the Counter-Defendant costs and attorney fees regarding this matter.

DATED: December 23, 1980

MURPHY, BURNS & McINERNEY, P.C.
Attorneys for Defendants

By: Peter F. Walsh (P28040)
BUSINESS ADDRESS:
1000 Campau Square Building
180 Monroe, N.W.
Grand Rapids, MI 49503

SUPERIOR

Restrictions Recommended by City Hearing Office

	June 20, 1980	August 4, 1980
(1)	Hours of operation:	8:30 - 5:00 (M-F)
(2)	Rate of Process:	300 vehicles per 8 hour day
(3)	Maintenance:	regular, as indicated by daily inspection
(4)	Record log:	Hours of operation, inspection results
(5)	Materials:	Inspection for fuel tanks/removal
(6)	Materials:	Verification of fuel tank removal
(7)	Bear costs of vibration measurements (ground levels)	

SUPERIOR
Actual License Restrictions
August 13, 1980

(1) As recommended
(2) As recommended
(3) Addition - employ full-time millwright
(4) As recommended
(5) Addition - inspect for transmissions, driveshafts, etc.
(6) Addition - structural levels (e) cease operation if greater than 60 dbgs
(7) Provide all bonds, license fees, and taxes
(8) Fully comply with all Federal, State and Local laws
(9) Enforcement officer provided
(10) City may revoke on filing of complaint
(11) City may revoke should DNR revoke permit

SUPERIOR

Operational Incidents

Vibration Test: Passed August 13, 1980

Materials explosion - September 4, 1980
1) license revoked
December 9, 1980

Materials explosion - September 15, 1980

Vibration test: Passed October 30, 1980)

Vibration test: Passed November 17, 1980
2) Respondents State Court Original Action) Complaint filed December 17, 1980

Vibration test: Passed December 1, 1980
Materials explosion December 4, 1980

SUPERIOR

Restrictions of Preliminary Injunction
January 8, 1981
(Ex. 29)

(1) Same as license
(2) Same as license
(3) Same as license
(4) Same as license
(5) Same as license
(6) Same as license
(7) Same as license
(8) Same as license
(9) Deleted
(10) Deleted
(11) Deleted
(12) Addition: $10,000 bond
(13) Addition: $2,000 explosion bond

Successors Owner Original Restrictions In Order to Commence Operation of Shredder 1986

(1) Hours: 8:00 - 5:00 (M-F)
(2) Same as Superior license
(3) Same as Superior license
(4) Same as Superior license
(5) Deleted
(6) Same as Superior license
(7) Same as Superior license
(8) Same as Superior license
(9) Deleted
(10) Deleted
(11) Deleted
(12) Deleted
(13) Deleted

Successor Owner's Modified New hours of Operations as of June 5, 1986

(1) Hours: 8:00 - 6:00 (M-F)
10:00 - 6:00 (Saturday)
(36% INCREASE IN HOURS)
(a) Should breakdown occur, operate additional hour following day

(2) Same as previous order
(3) Same as previous order
(4) Same as previous order
(5) Same as previous order
(6) Same as previous order
(7) Same as previous order
(8) Same as previous order

SUCCESSORS
Operational Incidents

Vibration test: Passed May, 1986
Materials explosion: July 28, 1986
Vibration test: Passed August, 1986
Materials explosion: October 22, 1986
Vibration test: Passed November, 1986

Note: Vibration level increasing

Successor Owner's Actual License
Restrictions as of
December 5, 1986

(1) Same as previous order (36% increase in operating hours)
(2) Same as previous order
(3) Same as previous order
(4) Same as previous order
(5) Same as previous order
(6) Deleted
(7) Same as previous order
(8) Same as previous order

Transcript of new owner hearings - November 26, 1986

Important: Court Order dismissing suit - December 5, 1986

U.S. CONSTITUTION, AMENDMENT 5

. . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION
AMENDMENT 14

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONSTITUTION

ARTICLE 5,
Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§1738. . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch 646, § 1, 62 Stat. 947).

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an actin at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S.§1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)

Supreme Court, U.S.
FILED
JAN 21 1998
CLERK

No. 97-1016

In The

Supreme Court of the United States

October Term, 1997

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Petitioner,

vs.

CITY OF KALAMAZOO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the District Court and the United States Sixth Circuit Court of Appeals follow the prior decisions of this Court and correctly apply the full faith and credit provisions of 28 U.S.C. § 1738 to a prior decision entered by a state court?

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B. The petition does not adequately describe the constitutional claims asserted by Superior in the counterclaim which it filed in the first state court action in 1980, or the final disposition of those claims in 1984. 6

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STATEMENT OF THE CASE

The petition which has been filed in this matter seeks the review by this Court of the Sixth Circuit's opinion affirming the granting of the City of Kalamazoo's motion for summary judgment and the dismissal of the Petitioner's claims by the District Court. The petition contends that both the District Court and the Sixth Circuit erroneously applied the full faith and credit provisions of 28 U.S.C. § 1738 to a prior state court decision.

As set forth below, there is no basis for this Court to review the factbound contentions set forth in this petition, which have previously been rejected by the United States District Court and the Sixth Circuit Court, as well as the state courts of Michigan.

On July 26, 1995, Petitioner filed the underlying action in this matter in the United States District Court for the Western District of Michigan. The complaint which was filed in this matter by the Petitioner alleged a constitutionally improper "taking" had occurred during the period between 1980, when the City of Kalamazoo had initially revoked the license of Superior Metal Shredders, Inc. (thereby effectively preventing its operation of an automobile shredder generally considered to be a nuisance), and October, 1984, when the Kalamazoo County Circuit Court finally granted the City's request for a permanent injunction against operation of the shredder.[1] The takings claims raised by Petitioner's complaint in this action were essentially identical to those which had been raised by the Petitioner against the City in the action which had been

1. The City initiated legal action against Superior in December, 1980, seeking to enjoin it from operating without a license, in violation of City ordinances, and to abate its operation of the shredder as a public nuisance. Pet. App. A15.

filed in Kalamazoo County Circuit Court in 1989.[2] That suit had been dismissed with prejudice in July, 1990, on the basis of res judicata, because it was determined that the takings claims alleged in that case were essentially the same as the claims alleged in a counterclaim which had been filed by Superior in the 1980 action in Kalamazoo County Circuit Court.[3]

On August 15, 1996, the United States District Court granted a motion for summary judgment filed by the City of Kalamazoo on the basis that the Petitioner's claims of a taking were barred by the doctrine of res judicata, and dismissed the Petitioner's complaint. Pet. App. A14.

The Sixth Circuit affirmed that decision on September 30, 1997, and held that (1) the doctrine of res judicata applies to claims based upon 42 U.S.C. § 1983 which were previously litigated in state court; (2) under Michigan law, res judicata, or claim preclusion, prevents a plaintiff from litigating a claim that was actually litigated, or could have been litigated, in an earlier proceeding; (3) the District Court properly gave full faith and credit to the decision of the state court to dismiss Petitioner's 1989 state court action on principles of res judicata; and (4) the

---

2. Petitioner's complaint in this action was identical to the complaint filed by Petitioner against the City in Kalamazoo County Circuit Court in 1989, with only the addition of subparagraphs A-K to paragraph 3 of the 1989 complaint. Both complaints asserted state and federal takings claims against the City as a result of its efforts to enforce its ordinances, and to abate operation of the shredder as a public nuisance. Pet. App. A8-9

3. In 1984, the Kalamazoo County Circuit Court had dismissed Petitioner's counter-claim with prejudice, when it granted the City's request for a permanent injunction against operations of the shredder. That decision was not appealed. Pet. App. A15.

Petitioner could not collaterally attack the state court decision which had been entered in 1990, and affirmed by the Michigan Court of Appeals in 1992. Pet. App. A7-10.

A. The petition fails to describe the underlying facts which led to entry of a permanent injunction in the state court action in 1984, which thereafter prohibited Superior from any further operation of the shredder.

The petition which was filed in this matter erroneously describes the events which occurred between 1979 and 1984 as if Superior was an innocent victim of the City's over zealous efforts to prevent it from doing business as a recycling dealer. The petition conveniently omits the extent of the nuisances created by the shredder during that time period and ignores the fact that the shredder was frequently operated by Superior in violation of the City ordinance, and in violation of the orders of the Kalamazoo County Circuit court, which had maintained jurisdiction of the matter during that four year period.

Soon after Superior commenced operation of the shredder, the City began to receive complaints from neighbors and citizen groups concerning the excessive vibration, explosions, noise and pollution which emanated from the shredder. In response to those complaints, the City amended City Ordinance 24-20 to provide that:

> a recycling dealer's business shall be so conducted as not to create a nuisance by reason of noise, odors, smoke, fumes, vibration or any other reason or condition.

JA 9, 10, 63.[4]

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4. References to "JA" refer to pages of the joint appendix in the Sixth Circuit not included in the petitioner's appendix.

Following additional explosions at Superior in March of 1980, the City held license revocation hearings in April, May and July of 1980. On August 13, 1980, Superior's license was renewed, but was conditioned upon continued operation of the shredder in compliance with operational restrictions which had been recommended by a neutral hearing officer in order to prevent future explosions and reduce vibration levels. Superior failed to comply with the restrictions imposed upon its license. Explosions occurred at the shredder on September 4, 1980, September 15, 1980 and December 4, 1980. Following a hearing held on December 8, 1980, Superior's license was revoked on December 16, 1980.

On December 17, 1980, the City filed an action in Kalamazoo County Circuit Court to enjoin Superior from operating the shredder without a license and to abate a nuisance. On December 19, 1980, Kalamazoo County Circuit Judge Robert Borsos held an evidentiary hearing and then granted the City's request for a temporary restraining order against Superior.

On January 8, 1981, Judge Borsos lifted the temporary restraining order and conditioned any further operation of the shredder on the compliance with the same operating restrictions which had been recommended by the hearing officer in August, 1980.[5] Complaints by nearby residents continued, however, and on June 3, 1981, Judge Borsos again ordered Superior to cease operating the shredder pending the results of further vibration tests and proof that the shredder was not producing excessive vibration levels.

---

5. Superior operated without a recycling dealers license from January 8, 1981, until the permanent injunction was entered in October, 1984. Its operation for this period was only with, or without, the permission of the Kalamazoo County Circuit Court. JA 11-15

ordered restrictions, and the continuing and ongoing complaints by residents in the community, which eventually resulted in the permanent injunction being entered by the Kalamazoo County Circuit Court against any further operation of the shredder by Superior, in October, 1984.

B. The petition does not adequately describe the constitutional claims asserted by Superior in the counterclaim which it filed in the first state court action in 1980, or the final disposition of those claims in 1984.

The petition's single sentence description of the counterclaim filed by Superior in the state court action in 1980 (Pet. p. 6) fails to adequately describe the constitutional claims which were presented by Superior in that action.[6]

The fact that Superior had, in essence, alleged a "taking" in violation of the United States and Michigan Constitutions was not lost on Judge Schma at the time he dismissed the state and federal takings claims on grounds of res judicata in the second state court action. JA 330.

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6. Paragraphs 7 and 8 of the counterclaim of Superior dated December 23, 1980, stated as follows:

> 7. That at said hearing Counter-Defendant unreasonably, arbitrarily and without any pretense of due process as that term is defined by Michigan and Federal Case Law revoked said license.
>
> 8. That this revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished by said ordinance and is void and of no effect and violative of the Constitution of the State of Michigan and the Constitution of the United States of America and the Fourteenth Amendment thereto.

The Court should also be aware that at the time of the entry of the permanent injunction against Superior in 1984, the Order of the Kalamazoo County Circuit Court also provided that:

> IT IS FURTHER ORDERED that this case of action, including all claims, appeals, counter-claims and affirmative defenses, whether based on Federal, Constitutional or statutory law, civil rights or otherwise shall be, and is hereby dismissed with prejudice.

JA 177.

REASONS FOR DENYING THE WRIT

The petition's claim that the District Court and the Sixth Circuit improperly applied the full faith and credit provision under 28 U.S.C. § 1738 does not merit review by this court because the law is well settled. The decisions below correctly applied prior decisions of this Court to the unusual facts of this case, the law is well settled, and no conflict among any of the circuits has been alleged by the petition.

1. The law is well settled that 28 U.S.C. § 1738 requires a federal court to give the same preclusion effect to a state court decision as would the state where the judgment is rendered. *Migra v. Warren City School District*, 465 U.S. 75, 80, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 466, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); *Allen v. McCurry*, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). In *Migra, supra*, this Court held that 28 U.S.C. § 1738 precludes the bringing of a complaint under 42 U.S.C. § 1983 in District Court, where the claims could have been raised in prior state court litigation between the same parties. In that decision this Court further

held that the District Court is the proper court to interpret and apply state law regarding preclusion of claims. *See also Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985).

2. The District Court and the Sixth Circuit correctly applied the settled law which has been developed by this Court, *vis a vis*, full faith and credit, to the unusual factual circumstances of this case. Their decision correctly recognized that under Michigan law, a Plaintiff is precluded from litigating a claim that actually was litigated, or which could have been litigated, in an earlier proceeding between the same parties. *Eliason Corporation v. Bureau of Safety and Regulation of Michigan Department of Labor,* 564 F. Supp. 1298 (W.D. Mich. 1983); *Jones v. State Farm Insurance Company*, 202 Mich. App. 393, 401, 509 N.W. 2d 829 (1993).

The lower courts correctly determined that Petitioner's 1989 state court action included claims of taking under state and federal law, while noting as mentioned in footnote 3 of this brief, that the Petitioner's complaint filed in state court in 1989 was essentially identical to the Petitioner's complaint which was before them in this action, and that both complaints were based upon the same contentions of city regulation as had been raised in the first state court action in 1980.

3. The crux of the argument set forth in the petition is that the state court decision rendered in 1990 was wrong, and therefore the lower courts should not have applied the full faith and credit provision to that decision. However, the lower courts in this matter properly applied the full faith and credit provision to the state court decision, even assuming, arguendo, that the state court had made the wrong decision.

This Court has ruled that federal district courts, being courts of original jurisdiction, have no authority to review final determinations of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). This is true even when the challenge to the state court decision involves a federal constitutional issue. *Feldman*, 460 U.S. at 482-486, 75 L. Ed. 2d at 222-225.

It is evident from the complaint filed in this action, which is essentially identical to the complaint filed in the 1989 state court action, that Plaintiff was seeking to review, by reasserting the same claim, what had already been decided and appealed through the state court system. This Court, in *Feldman* has made it clear that if such a review was to be undertaken, it could *only* have been undertaken by the United States Supreme Court in a timely manner, following the conclusion of the appeal process in state court in 1992.[7]

4. The petition's claims that the state court in the 1989 state court action did not have subject matter jurisdiction of the federal taking claim is also an improper attempt to collaterally attack that decision. Michigan law provides that error in the determination of questions of law or fact, upon which a court's jurisdiction depends, is error in the exercise of that jurisdiction which can only be challenged on direct appeal. *In re Hatcher*, 443 Mich. 426, 439, 505 N.W. 2d 834 (1993);

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7. Following the denial of leave to appeal by the Michigan Supreme Court in 1992, Petitioner filed, but failed to perfect, a petition for a writ of certiorari. The question stated in that petition was: "Whether an alleged 'taking claim' inverse condemnation under the Michigan Constitution, Article X, Section 2, and the United States Constitution, Amendment V, the State Courts can ignore the applicable state law and the federal law to deny the Petitioner his due process and equal protection rights to his day in court under the state theory of '*res judicata*.' " JA 337-339.

Jackson City Bank & Trust Co. v. Fredrick, 271 Mich. 538, 545-546, 260 N.W. 908 (1935).

Thus, it is appears that the lower courts in this matter were correct in applying the full faith and credit provisions of 28 U.S.C. § 1738 to the prior decision of the Michigan court in 1990.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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